

Application/Control Number: 10/015,631  
Art Unit: 3731  
Office Action Dated: October 5, 2005

### REMARKS

Claims 1 and 9 have been amended to remove the phrase "with respect to said surgical device". Accordingly, no new matter is involved. Claims 1 and 9 have been amended to refer to the first and second members as the fixed and moving members. Support for this can be found in claims 1 and 9 as originally filed. Accordingly, no new matter is involved. Claims 1 and 9 have also been amended to state that the device includes plurality of elastically constrained surgical fasteners, wherein said fasteners are not engaging one another and are spaced apart from one another. Support for this change can be found in claims 8 and 16, and in the specification beginning at page 20, line 9. Accordingly, no new matter is involved. Claims 8 and 16 have been cancelled herein. Accordingly, no new matter is involved.

In the previous office action, the Examiner rejected claims 1, 9 and 10-17 under 35 U.S.C. 112 second paragraph. Specifically, the Examiner stated:

Claim 1 recites the limitation "with respect to said delivery device" in line 10, renders the claim indefinite. Appropriate correction is required.

Claims 9 recites the limitation "with respect to said delivery device" in line 20, renders the claim indefinite. Appropriate correction is required.

Claims 1 recites the limitation "said first and said second members" in lines 13-14. There is insufficient antecedent basis for this limitation in the claim. Appropriate correction required.

Claims 9 recites the limitation "said first and said second members" in lines 22-23. There is insufficient antecedent basis for this limitation in the claim. Appropriate correction is required.

Claims 10-17 are rejected as depending on claim 9 and is similarly indefinite.

As noted above, claims 1 and 9 have amended to correct these informalities. Therefore, it is respectfully requested that the Examiner withdraw the 35 U.S.C. 112 rejection of Applicant's claims 1, 9 and 10-17.

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In the previous office action, the Examiner rejected claims 1,5-7,9,13-15, and 17 are rejected under 35 U.S.C. 102(b) as being anticipated by Allen et al. (U.S. 6,113,611). In addition, claims 2, 3, 4, 8, and 16 were rejected under 35 USC 103(a) as being unpatentable over Allen et al. (US 6,113,611) further in view of Wenstrom (US 6,007,566) and further in view of McGarry et al. (US 4,509,518).

As noted above, claims 1 and 9 have been amended to state that the device includes plurality of elastically constrained surgical fasteners, wherein said fasteners are not engaging one another and are spaced apart from one another. This feature is not disclosed in the prior art cited by the examiner either alone or in combination. Having a plurality of elastically constrained fasteners removes the need for jaw like devices shown in the McGarry reference. Therefore, it is respectfully requested that the Examiner withdraw the 35 U.S.C. 102 & 103 rejections of Applicant's claims 1-9 and 13-17.

Lastly, in the previous office action, the Examiner rejected claims 1-17 under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims of US Patents Nos. 6,551,333; 6,447,524; 6,425,900. Although the conflicting claims are not identical, they are not patentably distinct from each other.

Submitted herewith is a terminal disclaimer, disclaiming any term of any patent issuing on this application from the first to expire of the above patents. Therefore, it is respectfully requested that the Examiner withdraw the obviousness-type double patenting rejection of Applicant's claims 1-17.

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Applicants submit that all claims are now fully allowable over the prior art cited by the Examiner. Therefore, Applicants respectfully request that the Examiner re-examine and favorably reconsider Applicants' claims in the form of a Notice of Allowance.

Respectfully submitted,

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